DEWAN UNDANGAN NEGERI KELANTAN & ANOR.

v.

NORDIN SALLEH & ANOR. (1)

SUPREME COURT, KUALA LUMPUR
ABDUL HAMID OMAR LP
HARUN HASHIM SCJ
MOHD. YUSOFF MOHAMED SCJ
GUNN CHIT TUAN SCJ
EDGAR JOSEPH JR SCJ
[CIVIL APPEAL NO. 01-44-91]
3 APRIL 1992

CONSTITUTIONAL LAW: *Primary declaration - Constitutional validity of Article XXX1A of Part 1 of the Constitution of the State of Kelantan - Federal and State Laws - Conflict of jurisdiction - Extent of inconsistency of such laws - Whether inconsistent with Article 10(1)(c) of the Federal Constitution - Whether void under Article 4(1) of the Federal Constitution.*

CONSTITUTIONAL LAW: *State laws affecting fundamental rights - Whether restriction imposed by Dewan Undangan Kelantan creates a situation that directly affects the fundamental rights or its inevitable effect or consequence on the fundamental rights - Makes their exercise - "Ineffective or illusory" - Right to form association and the right to dissociate - Whether a member of a legislature can be penalised by ordinary legislation - Whether only Parliament alone may impose such restriction - Whether "disqualification" imposed vide Article XXX1A on the basis of party discipline - Materially negatives such freedom under the supreme constitution of Malaysia - Whether disqualification is caught by any of the grounds for disqualification specified under s. 6(1) of Part 1 to the Eighth Schedule to the Federal Constitution Article 4(1) of the Federal Constitution.*

STATUTORY INTERPRETATION: *Issue at point - Question of construction and question of law - Whether constitution should be construed with less rigidity and more generosity than other statutes - Sui juris - Calling for principles of interpretation of its own - Further principles of construction - To produce stability in constitutional law - To read the language of the constitution itself - Generously and not pedantically - As a whole to find its meaning by legal reasoning.*

The facts of the case are briefly set out as follows by the learned Judge of the High Court.

(i) The plaintiffs were elected to the Dewan Undangan Negeri Kelantan during the General Elections held on 21 October 1990 and subsequently sworn in as members.

(ii) On 25 April 1991 the first defendant passed the Enakmen Undang-Undang Perlembagaan Tubuh Kerajaan Kelantan (Bahagian Pertama) (Pindaan) 1991. ("the impugned legislation")

(iii) On 3 July 1991, the first defendant passed a resolution pursuant to the impugned legislation that the first and second plaintiffs had ceased to be members of the Dewan Undangan Negeri Kelantan and declared the seats for the constituencies of Sungai Pinang and Limbongan vacant.

(iv) By reason of the vacancies the Election Commission of Malaysia took steps to hold by-elections in the aforesaid constituencies, with the dates of nominations of candidates fixed for 12 August 1991 and the by-elections held and completed on 26 August 1991.

(v) In the by-elections aforesaid, the plaintiffs stood for election as candidates of the Barisan Nasional but lost.

Inter alia, the present appeal to the Supreme Court is grounded in the ruling made by the learned Judge at the High Court, where it was held that: Article XXX1A of part one of the Constitution of the State of Kelantan to the extent that it provides that a member of the Legislative Assembly who is a member of a political party, shall cease to be a member of the Legislative Assembly if he resigns or for any reason whatsoever ceases to be a member of such political party, is inconsistent with sub-clause (1)(c) of Article 10 of the Federal Constitution which enunciates the right to freedom of association and if so, to that extent invalid and therefore ineffective by virtue of sub-clause (1) of Article 4 of the Federal Constitution.

The inconsistency of Article XXX1A of the Kelantan Constitution *vis-a-vis* sub-clause (1) of Article 4 and sub-clauses (1)(c) and 2(c) of Article 10 of the Federal Constitution was the issue before the Supreme Court for determination.

Held:

[1] This Court shares Dr. Anand's view taken from the Supreme Court decision in *Smt. Maneka Gandhi's* case, that in testing the validity of State action with regard to fundamental rights, what the Court must consider is whether it directly affects the fundamental rights or its inevitable effect or consequence on the fundamental rights is such that it makes their exercise "ineffective or illusory".

[2] In this case the Kelantan Constitution - a State law by Article XXX1A, seeks to impose a restriction on the fundamental right of a member of the legislation to form associations which of course includes the right to dissociate and it operates by way of disqualification once the member exercises that right.

[3] This Court takes the view that it is inconceivable that a member of the Legislature can be penalised by any ordinary legislation for exercising a fundamental right which the constitution expressly confers upon him subject to such restrictions as only Parliament may impose and that too on specified grounds and on no other.

[4] The Court also observed that Article XXX1A does not impose any restriction on the fundamental right of association of the plaintiffs under the Constitution because they were free to exercise it and it is only if they did so they would incur the disqualification from membership of the Legislature. On this, the Court is in agreement with the views expressed by the Court in *Gunaratne's* case [1987] LR Com. 383 and *Ghosli's* case (AIR SC 812).

[5] This Court recognises that as regards that part of the plaintiff's case which alleged inconsistency between Article XXX1A of the Kelantan State Constitution and Article 10(1)(c) of the Federal Constitution, the alleged inconsistency must, first of all be identified.

[6] This primary declaration sought for in the present case was that Article XXX1A of the Kelantan State Constitution was inconsistent with Article 10(1)(c) of the Federal Constitution. If so, it would be void by reason of Article 4(1) of the Federal Constitution. No declaration had been sought that Article XXX1A was invalid on the ground that it related to a matter with respect to which the Kelantan State Legislature had no power to make law. In so holding this Court has taken into consideration the principles of legislative review enunciated in *Ah Thian v. Goverment of Malaysia* [1976] 2 MLJ 112, 113.

[7] In all the circumstances, the learned Judge has arrived at the unanimous conclusion that the direct and inevitable consequences of Article XXX1A of the Kelantan State Constitution which is designed to enforce party discipline does impose a restriction on the exercise by members of the Legislature of their fundamental right of association guaranteed by Article 10(1)(c) of the Federal Constitution and that such restriction is not only protected by Article 10(1)(c) of the Federal Constitution but clearly does not fall within any of the grounds for disqualification specified under s. 6(1) of Part 1 to the Eighth Schedule to the Federal Constitution.

[8] This Court agrees with the learned Judge in the Court below though on somewhat different gounds that by virtue of Article 4(1) of the Federal Constitution, Article XXX1A of the Kelantan Constitution is to that extent void.

[Appeal dismissed with costs.]

[**Bahasa Malaysia** Translation of Headnote]

UNDANG-UNDANG PERLEMBAGAAN: *Pengisytiharan asas - Keesahan Artikel XXX1A Bhg. 1 Perlembagaan Negeri Kelantan - Undang-undang Persekutuan dan undang-undang negeri - Konflik bidangkuasa - Sama ada tidak konsisten dengan Artikel 10(1)(c) Perlembagaan Persekutuan - Sama ada tidak sah dibawah Artikel 4(1) Perlembagaan Persekutuan.*

UNDANG-UNDANG PERLEMBAGAAN: *Undang-undang negeri menjejaskan kebebasan asasi - Sama ada sekatan yang dikenakan oleh Dewan Undangan Kelantan membawa kepada situasi yang secara terus menjejaskan kebebasan asasi atau mempunyai kesan atau kesudahan "inevitable" keatas kebebasan asasi - Menjadikan penggunaannya - "Ineffective or illusory" Hak untuk menubuhkan persatuan dan hak untuk menarik diri dari persatuan - Sama ada ahli 'legislature' boleh dikenakan penalti oleh undang-undang biasa - Sama ada hanya Parlimen boleh mengenakan sekatan - Sama ada kehilangan kelayakan (disqualification) yang dikenakan oleh Artikel XXX1A berasaskan disiplin parti - Sama ada menindas kebebasan di bawah Perlembagaan Tertinggi (Supreme) Malaysia - Sama ada kehilangan kelayakan tertakluk kepada mana-mana alasan untuk kehilangan kelayakan yang terkandung dalam s. 6(1) Bhg. 1, Jadual Lapan Perlembagaan Persekutuan dan Artikel 4(1).*

PENTERJEMAHAN STATUT: *Isu yang dipertikaikan - Soal pentafsiran dan soal undang-undang - Sama ada perlembagaan harus ditafsirkan dengan secara tidak 'rigid' dan lebih 'generous' dari statut - Sui juris - Prinsip tafsiran tersendiri - Prinsip tafsiran tambahan - Untuk menstabilkan undang-undang Perlembagaan - Bahasa dalam Perlembagaan - 'Generously' dan bukan 'pedantically' - Secara keseluruhan untuk mendapatkan erti melalui taakulan (reasoning) undang-undang.*

Fakta kes dirumuskan seperti berikut oleh Hakim Yang Arif Mahkamah Tinggi.

(i) Plaintif dipilih menjadi ahli Dewan Undangan Negeri Kelantan berikutan Pilihanraya Umum yang diadakan pada 21 Oktober 1990 dan seterusnya melafazkan sumpah sebagai ahli-ahli.

(ii) Pada 25 April 1991 defendan pertama meluluskan Enakmen Undang-Undang Perlembagaan Tubuh Kerajaan Kelantan (Bahagian Pertama) (Pindaan) 1991. ["the impugned legislation"].

(iii) Pada 3 July 1991, defendan pertama meluluskan satu resolusi berdasarkan "impugned legislation" tersebut bahawa plaintif pertama dan kedua hilang status keahlian mereka di Dewan Undangan Negeri Kelantan dan seterusnya mengisytiharkan kawasan Dewan Undangan Negeri Sungai Pinang dan Limbongan sebagai kosong.

(iv) Ekoran daripada kekosongan yang dinyatakan itu, Suruhanjaya Pilihanraya Malaysia telah mengambil langkah-langkah tertentu dan adakan pilihanraya kecil dengan hari pencalunan ditetapkan pada 12 Ogos 1991 dan pilihanraya ditetapkan dan dilaksanakan pada 26 Ogos 1991.

(v) Dalam pilihanraya kecil yang tersebut, plaintif bertanding atas tiket Barisan Nasional akan tetapi tidak berjaya.

Inter alia, rayuan ini ke Mahkamah Agung berasaskan pada keputusan yang dibuat oleh Hakim Yang Arif Mahkamah Tinggi, dimana diputuskan bahawa: Artikel XXX1A bahagian pertama Perlembagaan Negeri Kelantan berasaskan pada tahap dimana ianya menyekat seorang ahli Dewan Undangan Negeri yang menjadi ahli parti politik tertentu, akan hilang status keahlian Dewan Undangan sekiranya beliau menarik diri sebagai ahli parti tersebut atau berdasarkan apa-apa sebab dan sebagainya putus keahliannya dari parti politik tertentu itu adalah tak konsisten dengan klausa-kecil (1)(c) Artikel 10 Perlembagaan Persekutuan yang melafazkan hak dan kebebasan menubuhkan persatuan dan jika begitu pada tahap itu tak sah dan tidak berkesan pada hakikat klausa-kecil (1) Artikel 4 Perlembagaan Persekutuan.

Tak konsistennya Artikel XXX1A Perlembagaan Negeri Kelantan *vis-a-vis* klausa-kecil (1) Artikel 4 dan klausa-kecil (1)(c) dan 2(c) Artikel 10 Perlembagaan Persekutuan merupakan isu yang dipertengahkan dihadapan Mahkamah Agung untuk keputusan.

Diputuskan:

[1] Mahkamah ini mengambil pandangan yang sama seperti pandangan Dr. Anand berasaskan keputusan Mahkamah Agung dalam kes *Smt. Maneka Gandhi*, bahawa, bagi menguji sah atau tidak tindakan Negeri berhubung dengan hak asasi, apa yang hendak diambil kira oleh Mahkamah ialah sama ada tindakan Negeri itu terus menerus mempengaruhi hak asasi atau kesan yang tidak dapat dielak atau akibatnya terhadap hak asasi adalah untuk menjadikan penggunaan hak asasi itu "ineffective or illusory" (tak berkesan dan palsu).

[2] Dalam kes ini Perlembagaan Negeri Kelantan satu undang-undang Negeri oleh Artikel XXX1A, cuba mengenakan sekatan atas kebebasan hak asasi seorang ahli badan perundangan untuk menubuhkan persatuan yang mana juga meliputi kebebasan hak untuk melepaskan keahlian sesuatu persatuan dan ianya berkuatkuasa sebagai larangan apabila ahli itu menggunakan hak itu.

[3] Mahkamah ini berpendapat bahawa, mustahil seorang ahli badan perundangan boleh dikenakan hukuman oleh perundangan biasa kerana menggunakan kebebasan hak asasi yang mana diberi kurnia oleh perlembagaan secara nyata terhadapnya, tertakluk pada apa-apa sekatan yang hanya hendaklah dikenakan oleh Parlimen sahaja dan itu pun atas alasan-alasan yang tertentu sahaja dan bukan bertentang dengannya.

[4] Mahkamah juga memperhatikan bahawa Artikel XXX1A tidak mengenakan apa-apa sekatan terhadap hak asasi plaintif untuk menubuhkan persatuan dan dibawah perlembagaan mereka bebas untuk menggunakan hak itu dan hanya apabila menggunakan hak itu, mereka dikenakan larangan sari keahlian badan perundangan. Dalam perkara ini, Mahkamah ini bersetuju dengan perundangan yang dinyatakan oleh Mahkamah dalam kes *Gunaratne*.

[5] Mahkamah ini memegang pada pendapat bahawa sehubungan dengan kes plaintif yang menyatakan tak konsistennya diantara Artikel XXX1A Perlembagaan Negeri Kelantan dan Artikel 10(1)(c) Perlembagaan Persekutuan, apa yang dinyatakan sebagai tak konsisten itu hendaklah pada mulanya dikenal pasti.

[6] Pengisytiharan asas yang dipinta dalam kes ini adalah bahawa Artikel XXX1A Perlembagaan Negeri Kelantan tak berkonsisten dengan Artikel 10(1)(c) Perlembagaan Persekutuan. Jika benar, ianya tak sah oleh sebab Artikel 4(1) Perlembagaan Persekutuan tidak ada pengisytiharaan yang dipinta bahawa Artikel XXX1A tak sah atas alasan bahawa ianya berkaitan dengan satu perkara yang mana badan perundangan Kelantan untuk tidak ada bidang kuasa untuk mewujudkan undang-undang. Dengan mengambil keputusan seperti ini, Mahkamah ini ada ambil kira prinsip-prinsip mengkaji semula perundangan seperti yang diamalkan dalam kes *Ah Thian v. Goverment of Malaysia.*

[7] Setelah mengambil kira semua keadaan, Hakim Yang Arif telah sampai kepada keputusan sebulat suara bahawa secara langsung akibat Artikel XXX1A Perlembagaan Negeri Kelantan yang digubal untuk memperkuatkuasakan displin parti mengenakan satu sekatan terhadap penggunaan oleh ahli-ahli badan perundangan dalam penggunaan hak asasi untuk menubuhkan persatuan yang diberi jaminan oleh Artikel 10(1)(c) Perlembagaan Persekutuan dan bahawa sekatan seperti ini bukan sahaja diberi perlindungan oleh Artikel 10(1)(c) Perlembagaan Persekutuan, malah secara terang tidak jatuh dibawah mana-mana alasan larangan yang ditentukan dibawah s. 6(1) Bab I pada Jadual Lapan Perlembagaan Persekutuan.

[8] Mahkamah ini bersetuju dengan Hakim Yang Arif pada Mahkamah dibawah walaupun atas alasan-alasan yang lain bahawa pada hakikatnya Artikel 4(1) Perlembagaan Persekutuan, Artikel XXX1A Perlembagaan Negeri Kelantan pada tahap yang dinyatakan itu tak sah.

[Rayuan ditolak dengan kos.]

Cases referred to:

Clyde Engerniering Co. v. Coroburn [1926] 37 CLR 466
Mian Bashir Ahmad v. The State [1982] AIR Jammu & Kashmir 26 ***(dist)***
Raja Kulkami v. State of Bombay [1951] Bom 105 ***(cit)***
O.K. Ghosh v. E.X. Joseph [1963] AIR SC 812 ***(foll)***
Minister of Home Affairs v. Fisher [1980] AC 319 ***(cit)***
McKinley v. The Commonwealth of Australia [1975] 135 CLR 1 17 ***(cit)***
Amalgamated Society of Engineers v. Adelaide Steamship [1920] 28 CLR 129 ***(cit)***
Ong Ah Chuan v. PP [1981] AC 648 ***(cit)***
Loh Kooi Choon v. The Govt. of Malaya [1977] 2 MLJ 187 ***(cit)***
Smt. Maneka Gandhi v. Union of India [1978] AIR SC 597 ***(foll)***
Gunaratne v. People's Bank [1987] LR Com 383 ***(foll)***
Ah Thian v. Govt. of Malaysia [1976] 2 MLJ 112 ***(cit)***
Damyanti v. Union of India [1971] 1 SCC 678 ***(cit)***
Jamuna Prasad & Ors. v. Lachi Ram & Ors. [1955] 1 SCR 608 ***(cit)***
Sakhawat Ali v. State of Orissa [1953] 1 SCR 1004 ***(cit)***
London Passenger Transport Board v. Moscrop [1942] AC 35 ***(cit)***
Ikebife Ibeneweka & Ors. v. Peter Egbuna & Anor. [1964] 1 WLR 219 ***(foll)***
Vachar & Sons Ltd. v. London Society of Compositions (1)

Legislation referred to:

Central Civil Service (Conduct) Rules 1955 [Ind], r. 4B
Constitution of the State of Kelantan, art. XXX1A Part 1
Constitution of Sri Lanka 1972, art. 18(1)(f)
Election Offences Act 1954, s. 32

Federal Constitution, arts. 4(1), 6(1)Part 1 8th Sch., 10(1)(c), 10(2)(c), (3), (4), 72(2), 118
Constitution of India [Ind], art. 19(1)(a), (c)
Jammu and Kashmir High Court Rules [Ind], r. 21
J & K Representation of the People Act [Ind], s. 24-G

Other source referred to:
Parliamentary Practice, Sir Erskine May
Our Constitution Defaced and Defiled, N.A. Palkhivala, p. 68, para. 2
Australian Federal System, Lane, 2nd Edn. p. 882, 886
Effect of an Unconstitutional Statute, Oliver Field, Chapter 1

For the appellants - Zainur Zakaria (Hj. Idris bin Othman,& Zulkifli Noordin assisting); M/s. Zainur Zakaria & Co.
For the respondents - Zaki Azmi (Juliana Solomon with him); M/s. Rashid & Lee

JUDGMENT

Abdul Hamid Omar LP:

In this appeal, the dominant question of law which calls for determination is: whether Article XXXIA of Part One of the Constitution of the State of Kelantan (the Kelantan Constitution) to the extent that it provides that a member of the Legislative Assembly who is a member of a political party, shall cease to be a member of the Legislative Assembly if he resigns or for any reason whatsoever ceases to be a member of such political party, is inconsistent with sub-clause (1)(c) of Article 10 of the Federal Constitution which enunciates the right to freedom of association and, if so, to that extent invalid and therefore ineffective by virtue of sub-clause (1) of Article 4 of the Federal Constitution?

In the High Court at Kuala Lumpur, Eusoff Chin J (as he then was) answered the first part of the question in the affirmative and proceeded to hold that it was void under Article 4(1) of the Federal Constitution to the extent where it imposes a restriction in the exercise of the fundamental right of a member of the Kelantan State Legislative Assembly to resign his membership of a political party or for any other reason whatsoever ceases to be a member of such political party. The appeal is against that decision.

The constitutional problem posed emerged from the following facts as to which the parties to the appeal were and are both in the Court below and here in complete agreement. For brevity and convenience, those facts as set out in the judgment of the learned trial Judge are reproduced hereunder as follows:

a) The plaintiffs were elected to the Dewan Undangan Negeri Kelantan during the General Elections held on 21 October 1990 and subsequently sworn in as members.

b) On 25 April 1991 the first defendant passed the Enakmen Undang-Undang Perlembagaan Tubuh Kerajaan Kelantan (Bahagian Pertama) (Pindaan) 1991.

c) On 3 July l991 the first defendant passed a resolution pursuant to the impugned legislation that the first and second plaintiffs had ceased to be members of the Dewan Undangan Negeri Kelantan and declared the seats for the constituencies of Sungai Pinang and Limbongan vacant.

d) By reason of the vacancies, the Election Commission of Malaysia took steps to hold by-elections in the aforesaid constituencies, with the dates of nominations of candidates fixed for 12 August 1991 and the by-elections held and completed on 26 August 1991.

e) In the by-elections aforesaid, the plaintiffs stood for election as candidates of the Barisan Nasional but lost.

It would be more convenient if we referred to the two appellants as the first and the second plaintiffs and the two respondents as the first and the second defendants. The Suruhanjaya Pilihanraya, Malaysia, the third defendant, has not appealed and so is not a party to this appeal.

To put matters in their proper perspective, it is necessary to reproduce Article XXXIA of the Kelantan Constitution sub-clause (1) of Article 4 and sub-clauses (l)(c) and (2)(c) of Article 10 of the Federal Constitution. They say this:

> XXXIA.(l) If any member of the Legislative Assembly who is a member of a political party resigns or is expelled from, or for any reasons whatsoever ceases to be a member of such political party, he shall cease to be a member of the Legislative and his seat shall become vacant.
>
> (2) For the purpose of Clause (1) the Legislative Assembly shall determine whether a seat has become vacant or as to when a seat becomes vacant and the determination of the Assembly shall be final and shall not be questioned in any Court on any ground whatsoever.
>
> Article 4. (l) This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.
>
> Article l0. (1) Subject to Clause (2), (3) and (4)-
>
> (a) every citizen has the right to freedom of speech and expression;
>
> (b) all citizens have the right to assemble peaceably and without arms;
>
> (c) all citizens have the right to form associations.
>
> (2) Parliament may by law impose:
>
> (a) xxx xxx xxx
>
> (b) xxx xxx xxx
>
> (c) on the right conferred by para. (c) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, public order or morality.
>
> (3) Restrictions on the right to form associations conferred by para. (c) of Clause (1) may also be imposed by any law relating to labour or education.

Before we embark upon a consideration of the arguments, advanced by Counsel on both sides, we would advert to two preliminary matters as to which, there appears to be no dispute. First, the enunciation of the right to freedom of association in sub-clause (1)(c) of Article 10 of the Federal Constitution means a citizen's right to form, to join, not to join or resign from an association. (See *Mian Bashir Ahmad v. The State* [1982] AIR Jammu & Kashmir 26, 55 para. 89; *Raja Kulkami v. State of Bombay* [1951] Bom 105). In *O.K. Ghosh v. E.X. Joseph* [1963] AIR SC 812, the Supreme Court of India was of the view that any restriction to dissociate from an association would make the guaranteed right under Article 19(1)(c) of the Constitution ineffective and illusory.

Second as the Judicial Committee of the Privy Council held in *Minister of Home Affairs v. Fisher* [1980] AC 319, at 329, a Constitution should be construed with less rigidity and more generosity, than other statutes and as *sui juris*, calling for principles of interpretation of its own, suitable to its character but not forgetting that respect must be paid to the language which has been used.

In this context, it is also worth recalling what Barwick CJ said when speaking for the High Court of Australia, in Attorney General of the Commonwealth ex relation *McKinley v. the Commonwealth of Australia* [1975] 135 CLR 1, 17:

> the only true guide and the only course which can produce stability in constitutional law is to read the language of the constitution itself, no doubt generously and not pedantically, but as a whole and to find its meaning by legal reasoning.

In our approach to this appeal we have accordingly kept in the forefront of our minds the principles aforesaid.

Before us the judgment of the learned Judge was attacked by Counsel for the appellant on a number of grounds the main thrust of which may be conveniently stated as follows:

It was argued that the learned Judge had misdirected himself in construing Article XXXIA of the Kelantan Constitution in a relation to Article l0(l)(c) of the Federal Constitution.

In particular, it was argued that the learned Judge failed to appreciate that the plaintiffs' right to be or to continue to be members of the Legislative Assembly of the State of Kelantan was distinct and separate from, and did not affect, their fundamental right under Article l0(l)(c) of the Federal Constitution.

As a result of the misdirection as aforesaid, it was said that the learned Judge did not take into account or failed to adequately consider or appreciate the broader constitutional issues underlying Article XXXIA of the Kelantan Constitution and the implications of the electoral process under the Federal and State Constitutions.

The constitutional problem to which the learned trial Judge had to direct his mind thus bore a strong resemblance to that which faced the Full Bench of Jammu and Kashmir in the Indian case of *Mian Bashir Ahmad & Ors. v. the State of Jammu & Kashmir & Ors.*, [1982] AIR (J & K Section) 26, a case which received considerable attention in his judgment.

It would therefore be convenient, at this stage, to direct our attention to that case. There, the issue central to the petition before the Court was whether s. 24-G of the J & K Representation of the People Act providing for cessation of membership of a legislator of the house to which he belongs in the event of his resigning his membership of the party to which he belongs on whose platform he contested the election and was elected, had violated the legislator's right to freedom of speech under Article 19(1)(a) and right to freedom of association guaranteed under Article 19(1)(c) of the Constitution of India. For easy reference, the relevant part of that Article is reproduced hereunder as follows:

Constitution of India

19. (1) All citizens shall have the right:

Protection of certain rights regarding freedom of speech etc.	(a) to freedom of speech and expression; (b) to assemble peacebly and without arms; (c) to form associations or unions.

(2) xxx xxx xxx xxx

(3) xxx xxx xxx xxx

(4) Nothing in sub-clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent **the State** from making any law imposing, in the interest of the sovereignty and intergrity of India or public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause.
(Emphasis added)

The Full Bench which comprised four Judges were equally divided with the Chief Justice Mufti Baha-Ud-Din and Mr. Mustice Mir holding that s. 24-G of the Representation of the People Act did not violate the legislator's right to freedom of speech under Article 19(1)(a) and the right to freedom of association under Article 19(1)(c) of the Indian Constitution, whilst on the other hand Mr. Justice Dr. Anand and Mr. Justice Kotwal, taking a diametrically opposed view. By r. 21 of the Jammu and Kashmir High Court Rules, the view taken by the Chief Justice and Mr. Justice Mir constituted the majority view, whilst the view taken by Mr. Justice Dr. Anand and Mr. Justice Kotwal constituted the minority view.

There are certain general observations we should like to make regarding *Mian Bashir Ahmad's* case.

It is obvious from the judgment of the Acting Chief Justice that in upholding the validity of the impugned legislation he had placed great stress upon what he described as the post-independence history of prevalent political defections and their baneful effect in that they had threatened the functioning of parliamentary democracy in many parts of the Indian sub-continent. He emphasised with great clarity and detail, including the citation of many examples, that these political defections were not because of genuine proddings of conscience but because of personal aggrandisement and rank opportunism and had thus become a pernicious form of political corruption threatening the functioning of parliamentary democracy contemplated by the Constitution. It was against the backdrop of these events, he said that the impugned legislation was enacted into law. In the words of the Ag. Chief Justice:

> Viewed on this background, it cannot be said that the object of the section is merely to curb dissent but the object, truly and properly understood, is to eradicate the evil of political defections in the State. In actual operation, however, the direct and inevitable effect of the section is that the legislator's liberty to vote in the legislature is impaired and, moreover, he will not be able to leave his party habitat so long as he continues to be a legislator. It is in the light of that background that we have to consider the validity of the impugned legislation.

The position in this country cannot however be said to be similar to the position in India then, for the background events to which we have briefly referred have no parallel here. Certainly, no attempt whatsoever was made either by the introduction of evidence or even by way of argument to establish the contrary.

In any event, it is axiomatic that the highest of motives and the best of intentions are not enough to displace constitution obstacles, so that the background events which led to the passing of the impugned legislation in Jammu and Kashmir are, with all due respect to the Ag. Chief Justice, irrelevant to the question of its constitutional validity.

It is not difficult to cite an anthology of cases for this proposition; suffice if we refer to the following cases.

In *Amalgamated Society of Engineers v. Adelaide Steamship* [1920] 28 CLR 129 Knox, Chief Justice speaking for the High Court of Australia, said at p. 152, thus:

> Therefore the doctrine of political necessity, as a means of interpretation, is indefensible on any ground.

In *Minister of Home Affairs v. Fisher* [1980] AC 319, Lord Wilberforce, speaking for their Lordships of the Board said that the way to interprete a constitution on the Westminister model is to treat it not as if it were an Act of Parliament but "as *sui juris*, calling for principles of interpretation of its own, suitable to its character ... without necessary acceptance of all the presumptions that are relevant to legislation of private law."

In *Ong Ah Chuan v. PP* (PC) [1981] AC 648 Lord Diplock speaking for their Lordships of the Board referred with approval to the extract from the judgment of Lord Wilberforce quoted above, and added: "As in that case, which concerned fundamental rights and freedoms of the individual guaranteed by the Bermuda Constitution their Lordships would give to Part IV of the Constitution of the Republic of Singapore" a generous interpretation avoiding what has been called "the austerity of tabulated legalism," suitable to give to individuals the full measure of the (fundamental liberties) referred to "(p. 328)".

And, in *Loh Kooi Choon v. The Government of Malaya* [1977] 2 MLJ 187 Raja Azlan Shah FJ (as he then was) speaking for the Federal Court said this at p. 188 col. 1 D to E:

> The question whether the impugned Act is "harsh and unjust" is a question of policy to be debated and decided by Parliament, and therefore not meant for judicial determination. To sustain it would cut very deeply into the very being of Parliament. Our Courts ought not to enter this political thicket, even in such a worthwhile cause as the fundamental rights guaranteed by the Constitution, for as was said by Lord Macnaghten in *Vacher & Sons Ltd. v. London Society of Compositors* (1):
>
> Same people may think the policy of the Act unwise and even dangerous to the community. Some may think it at variance with principles which have long been held sacred. But a judicial tribunal has nothing to do with the policy of any Act which it may be called upon to interpret. That may be a matter for private judgment. The duty of the Court, and its only duty, is to expound the language of the Act in accordance with the settled rules of construction. It is, I apprehend, as unwise as it is unprofitable to cavil at the policy of an Act of Parliament, or to pass a covert censure on the Legislature.

We must now turn to the minority opinion in *Mian Bashir's* case which commended itself to Mr. Justice Eusoff Chin.

The main judgment which constituted the minority opinion was delivered by Dr. Anand. The most pertinent point of his Lordship's judgment on the correct approach to adopt in determining whether the impugned legislation violates the fundamental right guaranteed under Article 19(1)(c) of the Constitution was that (p. 59 para. 101):

> the legislation can be, of course, struck down if it directly infringes the fundamental rights of a legislator but **it can also be struck down if the inevitable consequences of the legislation is to prevent the exercise of the fundamental rights guaranteed under Article 19(1)(c) or to make the exercise of that right 'ineffective or illusory.**

In so holding, his Lordship relied upon the judgment of the Supreme Court of India in *Smt. Maneka Gandhi v. Union of India,* [1978] AIR SC 597, 632, 633 where the entire case law on the point was considered, and where their Lordships explained, that the word "direct" would go to the quality or character of the effect and not the subject matter: and, on the other hand, they pointed out "that the test of "inevitable" consequence "helps to quantify the extent of direction necessary to constitute" infringement of a fundamental right. Now, if the effect of State action on a fundamental right is direct and inevitable, then a *fortiori* it must be presumed to have been affected ... this is the test which must be applied for the purpose of determining whether the impugned order made under it is violative of Article 19(1)(a) or (c)".

Explaining the expression "direct and inevitable effect" as used by their Lordships in *Smt. Maneka Gandhi's* case, Dr. Anand said (at p. 59 para. 102 Col. 2) that the impugned action would be struck down if either it directly affects the fundamental rights or its inevitable effect on the fundamental rights is such that it makes their exercise "ineffective or illusory".

He then proceeded to conclude as follows:

> Since the inevitable effect of s. 24 - G (a) is that it makes the exercise of right of association guaranteed under Article l9(1)(c) ineffective and illusory in as legislators are concerned, it must be held to be unconstitutional.

We share Dr. Anand's view taken from the Supreme Court decision in *Smt. Maneka Gandhi's* case, that in testing the validity of State action with regard to fundamental rights, what the Court must consider is whether it directly affects the fundamental rights or its inevitable effect or consequence on the fundamental rights is such that it makes their exercise 'ineffective or illusory'.

The next point which we would direct our minds to is whether the right to stand as a candidate and to contest an election is a statutory right regulated by the relevant statute - in this case the Kelantan Constitution - and the exercise of which right depends upon compliance with the conditions laid down therein. Clearly, the answer to this question is in the affirmative. In other words, no one has a fundamental right to be elected a member of Parliament.

Be that as it may, the position is clear in that upon his election to the Legislature, the right to freedom of speech and expression in the legislature is guaranteed by Article 72(2) of the Constitution and the right to continue as a member for the whole of the duration of the term of the Legislature is likewise guaranteed by the Constitution with this qualification; namely that a member of the Legislature may be disqualified upon the grounds specified in s. 6(1) of Part I of the Eight Schedule to the Constitution, the provisions of which are inserted in every State Constitution in our country.

Quite apart from the rights we have just mentioned, a member enjoys, in common with other citizens, the fundamental rights or liberties guaranteed under Article 10(1) of the Federal Constitution; namely, the right to freedom of speech and expression, the right to assemble peaceably and without arms, and the right to form associations, subject to such restrictions as Parliament may impose on the grounds specified in Article 10(2).

We are supported in this by the following passage in Sir Erskine May's well respected work on "*Parliamentary Practice*" where he explains the content of parliamentary privileges in the following terms:

> The sum of peculiar rights enjoyed by each House collectively as a constituent part of the High Court or Parliament, and by members of each House individually, without which they could not discharge their functions, and which **exceed those possessed by other bodies or persons.**

Turning to the right to form associations guaranteed by Article l0(l)(c), it being the right of direct relevance to the issue which arises for decision in the present case, by Article 10(2)(c) only **Parliament** may by law impose such restrictions thereon, as it deems necessary or expedient in the most exceptional circumstances and that too in the interest of the security of the Federation or any part thereof, public order or morality, and on no other grounds.

In this case the Kelantan Constitution - a State law - by Article XXXIA, seeks to impose a restriction on the fundamental right of a member of the Legislature to form associations which, of course includes the right to dissociate, and it operates by way of disqualification, once the member exercises that right.

It is, in our view, inconceivable that a member of the Legislature can be penalised by any ordinary legislation for exercising a fundamental right which the Constitution expressly confers upon him subject to such restrictions as only Parliament may impose and that too on specified grounds, and on no other grounds.

We are thus reminded of what Mr. N.A. Palkhivala, the eminent Indian constitutional lawyer said at p. 68 para. 2 of his book "*Our Constitution Defaced and Defiled*":

> No greater insult can be imagined to members of Parliament and the State legislatures than to tell them that once they become members of a political party, apart from any question of the party constitution and any disciplinary action the party may choose to take, the Constitution of India itself expects them to have no right for themselves, but they must become soulless and conscienceless entities who would be driven by their political party in whichever direction the party chooses to push them.

In the present case, we would not overlook the submission of Encik Zainur for the defendants that Article XXXIA does not impose any restriction on the fundamental right of association of the plaintiffs under the Constitution because they were free to exercise it and it is only if they did so they would incur the disqualification from membership of the Legislature.

In *Gunaratne v. People's Bank* [1987] LR Com. 383 the appellant had been required to resign from a trade union in order to qualify, under the terms of his letter of appointment issued by the respondents, for promotion. He refused to sign and sought in the District Court a declaration that his fundamental right to freedom of association under Article 18(1)(f) of the Constitution of Sri Lanka 1972, (equivalent to our Article l0(l)(c) had been violated. It was held that he was entitled to the declaration but on appeal to the Court of Appeal, the decision was reversed. The appellant then appealed to the Supreme Court. In allowing his appeal and restoring the judgment of the District Court, Wanasundera J had to consider a similar point to that advanced by Encik Zainur and to which we have just referred. At p. 393 para. d to f, his Lordship said, *inter alia*, this:

> But, on the other hand, if a person is a member of a lawful trade union which is engaged in lawful activity, a dismissal or disciplinary action solely on this ground would certainly violate the constitutional guarantee. It was, however, sought to interpret this case to mean that an employee can be dismissed for exercising his fundamental right of joining or being in a union and that it would be a sufficient answer to an action challenging the dismissal to say that the order does not in fact interfere with the employee's right of association as this right still remains with him. Applying this argument to the facts of the present case, it is suggested that it would be legitimate to have a condition in the contract of employment against the employee joining a union and such a condition would not as such interfere with his right of association because he will continue to have the right and if he insists on it he must seek employment elsewhere. This appears to me to be a misunderstanding of the language and a complete misreading of the case. Such an interpretation which strangely enough had appealed to the Court of Appeal would, if given effect to, result in nothing less than this guaranteed right being wiped out altogether from the Constitution.

In *Ghosh v. Joseph* AIR SC 812, r. 4 B of the Central Civil Service (Conduct) Rules (1955) laid down that no Government Servant shall join or continue to be a member of any service association of Government Servants:

(a) which had not within a period of six months of its formation obtained the recognition of the government under the rules prescribed in that behalf or;

(b) recognition in respect of which has been refused or withdrawn by the Government under the said rules.

These rules were to be read along with the Recognition of Service Association Rules 1959. In the course of his judgment Gajendragadkar J said this:

> It is not disputed that the fundamental rights guaranteed by Article 19 can be claimed by Government Servants ... Thus, the validity of the impugned rule has to be Judged on the basis that the respondent and his co-employees are entitled to form associations or unions. It

> is clear that R.4-B imposes a restriction on this right. It virtually compels a Government Servant to withdraw his membership of the Service Association of Government Servants as soon as recognition accorded to the said association is withdrawn or if, after the association is formed, no recognition is accorded to it within six months. In other words, the right to form an association is conditioned by the existence of the recognition of the said association by the Government. If the association obtains the recognition and continues to enjoy it, Government Servants can welcome members of the said association; if the association does not secure recognition from the Government, or recognition granted to it is withdrawn, Government Servants must cease to be the members of the said association. That is the plain effect of the impugned rule. Can this restriction be said to be in the interests of public order and can it be said to be a reasonable restriction? In our opinion, the only answer to these questions would be in the negative. It is difficult to see any direct or proximate or reasonable connection between the recognition by the Government of the association and the discipline amongst, and the efficiency of, the members of the said association. Similarly, it is difficult to see any connection between recognition and public order. - (*Vide* also *Madan Lal v. Deputy Inspector General of Police* [1963] AIR Rajasthan 136).

We are in agreement with the views expressed by the Court in *Gunaratne's* case and *Ghosh's* case quoted above.

The remaining points in this appeal may be dealt with briefly.

We recognise that as regards that part of the plaintiffs' case which alleged inconsistency between Article XXXIA of the Kelantan State Constitution and Article l0(1)(c) of the Federal Constitution, the alleged inconsistency must, first of all, be identified.

According to *Lane on the Australian Federal System*, 2nd Edn. p. 882,

> Etymologically, inconsistency arises between two things "when they cannot stand together at the same time". *Clyde Engineering Co. Ltd. v. Cowburn* [1926] 37 CLR 466, at p. 503. "Inconsistency" derives from "in" (privative) and "con" (together) and "sistere" (stand). Judicially, however, the meaning of inconsistency has not been restricted to this narrow connotation. "Inconsistent" for the High Court comprises four different relations (including the one just given):
>
> (1) Impossible to obey both laws and direct collision.
>
> (2) Commonwealth permits or confers: State prohibits or deprives.
>
> (3) Commonwealth confers or imposes: State modifies.
>
> (4) Commonwealth covers the field: State enters the field.

It appears to us that of the four different relations mentioned above, the one relevant to the issue which arises for decision in the present case is the situation under para. (2).

At p. 886, in commenting on para. (2) the learned author says this:

> A Commonwealth law may simply permit X subject to certain prerequisites, and, by contrast, a State law may prohibit X absolutely or permit X conditionally upon its prerequisites being fulfilled.

And further down, on the same page, he says this by way of explanation:

> One statute is inconsistent with another when it takes away a right conferred by that other"... or, "(i)f one enactment makes or acts upon as lawful that which the other makes unlawful ... the two are to that extent inconsistent." (*Clyde Engineering Co. Ltd. v. Cowburn* [1926] 37 CLR 466, at pp. 478, 490).

Applying the principles enunciated above, and having regard to the test laid down by the Supreme Court of India in *Smt. Maneka Gandhi's* case to determine the constitutional validity of a state law to which we have referred, and what appears in the passages we have extracted from the judgments of Wanasundera J in *Gunaratne's* case and Gajendragadkar, J in *Ghosh's case*, we are satisfied that the inconsistency alleged by the plaintiffs in their statement of claim had been made out.

We might as well add that we have not overlooked the point - not raised during the argument - that s. 24-G of J & K Representation of Peoples Act provides specifically for **disqualification** for, *inter alia*, being a member of the Legislative Assembly or the Legislative Council of the State, if a member having been elected as such member gives up his membership of the political party by which he was set up as a candidate in such election **whereas** the word "disqualification" does not appear in Article XXXIA of the Kelantan State Constitution; instead, it provides, *inter alia*, that a member shall **vacate** his seat in the State Legislative Assembly if, *inter alia*, he resigns or is expelled from his political party. In our view, this is a difference without a distinction. The word "disqualified" is used in s. 24-G in a wide colloquial sense, so that a member becomes disqualified if he does some act or suffers some thing to be done which causes him to vacate his seat as a member; this is what Article XXXIA in effect provides. There is therefore nothing in the point.

We have also considered the question whether the proceedings in the Court below came under Article 4(3) of the Federal Constitution so that leave was required. We are satisfied that they do not.

The primary declaration sought for in the present case was that Article XXXIA of the Kelantan State Constitution was inconsistent with Article l0(l)(c) of the Federal Constitution. If so, it would be void by reason of Article 4(1) of the Federal Constitution. No declaration had been sought that Article XXXIA was invalid on the ground that it related to a matter with respect to which the Kelantan State Legislature had no power to make law.

In so holding, we have taken into consideration the principles of legislative review enunciated by Tun Suffian, LP in *Ah Thian v. Government of Malaysia* [1976] 2 MLJ 112, 113.

In all the circumstances, we have arrived at the unanimous conclusion that the direct and inevitable consequences of Article XXXIA of the Kelantan State Constitution which is designed to enforce party discipline does impose a restriction on the exercise by members of the Legislature of their fundamental right of association guaranteed by Article 10(1)(c) of the Federal Constitution, and that such restriction is not only not protected by Article 10(1)(c) of the Federal Constitution but clearly does not fall within any of the grounds for disqualification specified under s. 6(1) of Part I to the Eight Schedule to the Federal Constitution. Accordingly, we agree with the learned Judge in the Court below though on somewhat different grounds that by virtue of Article 4(1) of the Federal Constitution, Article XXXIA of the Kelantan Constitution is to that extent void.

In the event we would dismiss this appeal with costs.

Gunn Chit Tuan SCJ:

I have had the benefit of reading the draft judgment of Tun Abdul Hamid, LP, in Civil Appeal No. 01-44-91 (hereinafter referred to as the "the first appeal") and also that of Dato' Edgar Joseph Jr. SCJ, in Civil Appeal No. 01-2-92 (hereinafter referred to as "the second appeal").

As the facts as agreed to by the parties as well as the appellants' grounds of appeal and the contention of Counsel on both sides are set out fully in the judgment of Tun Abdul Hamid LP, in the first appeal as well as in that of Dato' Edgar Joseph Jr in the second appeal, I need not repeat them here. I would agree with both my learned brothers that the appeals should be dismissed with costs for the reasons stated in their respective judgments and I only have the following additional observations to make.

In certain countries without a written constitution such as England, the right of association, like all other rights of the citizen are derived from the principle that a man may do what he likes and therefore associate with whom he likes provided that no law is thereby broken. Various statutes there have however restricted this common law freedom, for example, there are statutes prohibiting secret societies or associations the object of which is to advocate or carry on some immoral purpose such as gambling. In Malaysia, freedom of association is guaranteed by Clause (l)(c) of Article 10 of the Federal Constitution and can only be on any of the grounds specified in Clauses 2(c) and (3) of Article 10, namely in the interest of the security of the Federation (hereinafter referred to as "Malaysia") or any part thereof, public order or morality (*Damyanti v. Union of India* [1971] I SCC 678, 686). When one reads Article XXX1A of the Kelantan Constitution, which is reproduced in the judgment of Tun Abdul Hamid, LP, it can be seen that it provides that if any member of the Legislative Assembly who is a member of a political party resigns or is expelled from, or for any reasons whatsoever, ceases to be a member of such political party, he shall cease to be a member of the Legislative Assembly and his seat shall become vacant. I cannot, by any stretch of imagination, see how such a restriction on the membership of a Legislative Assembly, which infringes a citizen's right to form associations under Article l0(l)(c) of the Federal Constitution, can be deemed necessary or expedient in the interest of Malaysia or any part thereof, public order, morality or even labour or education. As that Article XXXlA in the Constitution of Kelantan is inconsistent with the Federal Constitution, which is the supreme law of Malaysia, it is therefore void under Article 4(1) of the Federal Constitution.

Next it must be observed that Article 10(2) of the Federal Constitution provides that only Parliament may by law impose those restrictions referred to in Article 10(2), (3) and (4) of the Federal Constitution. Therefore even if any such restriction purported to have been imposed by the Constitution of the State of Kelantan was valid, and it is not, it is clear that the restriction could not be imposed by a law passed by any State Legislature. That would be another ground why Article XXXIA of the Constitution of Kelantan should be invalidated.

As the right to form associations is one of the fundamental rights guaranteed in the Federal Constitution, in this respect it is useful to be reminded of the following passage in the judgment of Raja Azlan Shah FJ (as he then was) in *Loh Kooi Choon v. The Government of* Malaysia [1977] 2 MLJ 187 at p. 189:

> As fundamental rights are not the same as ordinary rights, they can only be suspended or abridged in the special manner provided for it in the Constitution. In my opinion, the purpose of enacting a written Constitution is partly to entrench the most important constitutional provisions against repeal and amendment in any way other than by a specially prescribed procedure. Their Lordships of the Privy Council in *Hinds v. The Queen* took the view that constitutions based on the Westminster model, in particular the provisions dealing with fundamental rights, form part of the substantive law of the state and until amended by whatever special procedure is laid down in the constitution for this purpose, impose a fetter upon the exercise by the legislature of the plenitude of its legislative power.

As regards the test or yard-stick to be applied for determining whether a statute infringes a particular fundamental right, I would agree with Bhagwati J in *Maneka Gandhi v. The Union of India* [1978] AIR SC 597 at p. 635 that "the test (to be) applied was as to what is the

direct and inevitable consequence or effect of the impugned State action on the fundamental right". I agree with the Lord President that this is the test to be applied in this case and I also agree with the learned trial Judge who applied that test and held that Article XXXIA of the Kelantan State Constitution did impose a restriction on the exercise of the respondents' right of association guaranteed by Article l0(l)(c) of the Federal Constitution in that the respondents were penalised by a disqualification from continuing as members of the State Legislative Assembly as they have exercised their fundamental right of association guaranteed by Article l0(l)(c) of the Federal Constitution by resigning from one political party to join another. Here one must be reminded that the right to form an association under Article l0(l)(c) of the Federal Constitution also includes within its sweep the right to dissociate from an association. I would with respect follow the decision of the Indian Supreme Court in *O.K. Ghosh v. E.X. Joseph* [1963] AIR SC 812 when it opined that any restriction to dissociate from an association would make the guaranteed right of association "ineffective and illusory". I would also agree with the opinion expressed by Dr. Anand J in *Mian Bashir Ahmad v. State* [1982] AIR Jammu & Kashmir 26, 55, that whatever fundamental rights are available to a citizen cannot be denied to him on his election as a legislator as those rights inhere in every citizen including a legislator. Thus *prima facie* Article XXXlA of the Kelantan Constitution only provides that if a legislator dissociates from a recognised political party, he shall be disqualified to continue as a member of the legislature. That implies that a penalty is attracted for exercising the right guaranteed under Article l0(l)(c) in so far as the legislators are concerned because under that impugned legislation a legislator can only dissociate from a recognised political party on the pain of being disqualified to continue as a member of the State legislature. The direct and inevitable effect or consequence of Article XXXlA of the Kelantan State Constitution therefore was to make the exercise of the fundamental right of association of the respondents "ineffective and illusory".

I would again agree with Bhagwati J in *Maneka Gandhi v. The Union of India* that "the test which must be applied is whether the right claimed is an integral part of a named fundamental right or partakes of the same basic nature and character as the named fundamental right so that the exercise of such right is in reality and substance nothing but an instance of the exercise of the named fundamental right." Applying that test, I am of the view that the right claimed by the respondents in this case, that is, the right to leave one political party and to join another is an integral part of the fundamental right of association or at least partakes of the same basic nature and character as the freedom of association so that the exercise of that right to leave one political party and join another is in reality and substance nothing but an instance of the exercise of the fundamental right of association guaranteed under Article l0(1)(c) of the Federal Constitution. The object of Article XXXIA of the Kelantan State Constitution may ostensibly be to curb defection from one political party to another, but its direct and inevitable consequence is the abridgement of the respondents' right of association guaranteed by the Federal Constitution. For that reason, that impugned legislation should be struck down.

I would also deal briefly with the remaining points raised in the first appeal. It has to be noted that the Lord President in his judgment has already pointed out that no-one has a fundamental right to be elected a member of any legislature as the rights guaranteed by Article 10 of the Federal Constitution refer to natural and common law rights as distinguished from rights which are created by a statute. Therefore I would agree with Dato' Zaki, Counsel for the respondents, that some of the cases referred to by Counsel for the appellants are not relevant to the first appeal. Although I am aware that the purpose of Counsel for the appellants referring to those cases is to show that there is a need first to establish what is

the real complaint of the respondents in order to determine what is the right which they claim to have been violated, it need only be pointed out that *Jamuna Prasad & Ors v. Lachi Ram & Ors.* [1955] 1 SCR 608 and *Sakhawat Ali v. State of Orissa* [1953] 1 SCR 1004, which were among the cases cited, merely showed that a person in India has no fundamental right to stand as a candidate for the legislature and are therefore not directly relevant to the issues in the first appeal.

Another point raised by Counsel was with reference to the validity of the restrictions imposed on civil servants by Chapter 'D' of the General Orders. That point is of no relevance to these appeals and was not raised in the Court below. Counsel also referred to certain parts of UMNO's Constitution and contended that if the judgment of the learned trial Judge was accepted, then the regulations in UMNO's Constitution might be void as being violative of certain constitutional rights guaranteed by the Constitution. That again was a matter which was not raised in the Court below and was irrelevant in these appeals.

As regards the second appeal, it was the contention of Counsel for the appellants that the learned Judge should not have made the declaratory order because the Election Commission and the incumbents of the State seats, namely Haji Mahmud and Haji Samat, were directly affected but were not before the Court and he relied on the case of *London Passenger Transport Board v. Moscrop* [1942] AC 35 for his contention. I too consider that the answer to that contention can be found in the following passage in the judgment of Viscount Radcliffe in *Ikebife Ibeneweka & Ors. v. Peter Egbuna & Anor.* [1964] 1 WLR 219 at p. 226:

> However that may be, there has never been any unqualified rule of practice that forbids the making of a declaration even when some of the persons interested in the subject of the declaration are not before the Court, see *London Passenger Transport Board v. Moscrop* ("except in very special circumstances"), *New York Life Assurance v. Public Trustee.* Where, as here, defendants have decided to make themselves the champions of the rights of those not represented and have fought the case on that basis, and where, as here, the trial Judge takes the view that the interested parties not represented are in reality fighting the suit, so to say, from behind the hedge, there is, in their Lordships' opinion, no principle of law which disentitles the same Judge from disposing of the case by making a declaration of title in the plaintiffs' favour.

In any case, I consider that it has been correctly pointed out by Dato' Zaki, Counsel for the respondents, that the persons who could have been affected by the declaratory order chose not to make an application to Court to be joined as interested parties and the appellants in these appeals were in reality fighting the suit on behalf of the two present Assemblymen.

Reference was also made by Counsel for the appellants to Article 118 of the Federal Constitution and s. 32 of the Election Offences Act, 1954, which are reproduced in the judgment of Dato' Edgar Joseph Jr. SCJ, and contended that the learned Judge had no jurisdiction to make the declaratory order and that His Lordship had erred in having arrogated to himself the powers of an election Judge. Here again, I would agree with the contention of Counsel for the respondents that Article 118 is not relevant to the issues in the appeals before the trial Court as the respondents were not there challenging the validity of the by-elections. In any case, the reinstatement of the respondents are not dependant on the by-elections being declared void on grounds mentioned in s. 32 of the Election Offences Act 1954.

Finally I would note that Dato' Zaki, Counsel for the respondents, has referred us to Chapter 1 of Oliver Field's book called *Effect of an Unconstitutional Statute*. He referred us to the passage therein on the *Void Ab Initio Theory*. I notice that the authorities referred to therein are all cases decided in the United States of America whose Constitution is different from

ours. I would suggest that in this case we need not go further than Article 4 of our Federal Constitution which, as the supreme law, has declared that any law passed after Merdeka Day which is inconsistent with the Federal Constitution shall, to the extent of the inconsistency, be void. As the impugned Article XXXIA of the Kelantan State Constitution is inconsistent with the Federal Constitution, the learned Judge was therefore correct to have declared it void.

I have already indicated above that both the appeals be dismissed with costs and would add that there should be a further order that the deposit be paid to the respondents on account of taxed costs.

Also found at [1992] 2 CLJ 1125